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No. 04-037

Supreme Court, U.S.
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In The

Supreme Court of the United States

MICHAEL CLINGMAN, et al.,

Petitioners,

v.

ANDREA L. BEAVER, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF OF *AMICUS CURIAE* COALITION FOR FREE AND OPEN ELECTIONS IN SUPPORT OF AFFIRMANCE

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QUESTION PRESENTED

The question to be answered by this court is whether a political party is entitled under the United States Constitution to decide the basis on which to make its appeal to the public.

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INTEREST OF *AMICI*[1]

Amicus Northwest Legal Foundation is a non-profit public interest law firm focusing on constitutional First, Fifth and Fourteenth Amendment rights. The Northwest Legal Foundation has previously appeared as an *amicus* before this court[2] and before the Washington State Supreme Court.[3]

Amicus Coalition for Free and Open Elections (COFOE) includes representatives from several political parties including the Libertarian, Reform, Green, Socialist, Communist, Constitution, and Natural Law parties, and the Committee for a Unified Independent Party (CUIP). COFOE is the nation's largest coalition of third parties, and works to make ballot access and election laws more fair.

Amici believe the within brief will be of considerable help to this court on its review of the decision of the federal Court of Appeals for the Tenth Circuit in the case entitled *Beaver v. Clingman,* 363 F.3d 1048 (10th Cir. 2004). In offering this brief *amici* wish to make clear they take no position regarding what nominating rules the Libertarian Party of Oklahoma may adopt or wish to adopt in light of the political circumstances in Oklahoma, and might well disagree among themselves which rules to

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[1] The parties have consented to the filing of this brief.

Counsel for a party did not author this brief in whole or in part. No person or entity, other than the *amici*, its members, or its counsel made a monetary contribution to the preparation and submission of this brief.

[2] See, *Dolan v. City of Tigard*, 512 U.S. 374, 114 S.Ct. 2309 (1994).

[3] See, e.g., *R/L Associates, Inc. v. City of Seattle*, 113 Wash.2d 402, 780 P.2d 838 (1989), *Richmond v. Thompson,* 130 Wash.2d 368, 922 P.2d 1343 (1996).

adopt. Nonetheless, *amici* are unified in their belief that political parties, large and small, can best fulfill their historic role in American governance if allowed to decide the basis of their participation in the political process for themselves, and that the expressed state interests in the circumstances of this case have not been shown to warrant interference by regulation.

SUMMARY OF ARGUMENT

Political parties are an integral part of American governance. The First Amendment guarantees free exercise of political association rights. Free exercise of political association rights by both parties and voters furthers the purposes of the First Amendment. The First Amendment guarantees "broad" rights to political parties to adopt their own nominating rules. The burdens imposed by Oklahoma on the respondent political party members are severe, warranting strict scrutiny. The petitioners have not shown or articulated interests that overbalance infringement of the respondents' rights. Some interests articulated by the petitioners and their supporters are prohibited by the equal protection clause of the Fourteenth Amendment.

ARGUMENT

Political parties are an integral part of American governance.

Political parties are not just another set of special interest groups whose presence and demands the petitioners must suffer. "Representative democracy in any populous unit of governance is *unimaginable* without the ability of

citizens to band together in promoting among the electorate candidates who espouse their political views. The formation of national political parties was almost concurrent with the formation of the Republic itself."[4] (emphasis added)

Since the infancy of this nation political parties have performed the important functions of aggregating, coordinating and reconciling various political interests and providing the electorate with discrete normative visions of government and public policy. Indeed, under the Madisonian system of checks and balances, political parties are among the few coordinating forces that make any government action possible.[5] It may further be argued they are the only such force that is directly accountable to the people on a regular basis.[6]

Political party labels provide voters with important information regarding candidates. In addition, political parties tie candidates together in pursuit of common goals and policies, which the voters can collectively reward or punish every two years.[7] Stated alternatively, parties play an *essential* role "in brokering group interests and solving voter's collective action problems. A polity without parties places a greater cognitive burden on individual voters and

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[4] *California Democratic Party v. Jones*, 530 U.S. 567, 574, 120 S.Ct. 2402, 2408 (2000) (hereinafter *Jones*).

[5] See, e.g., E.E. Schattschneider, *Party Government*, 1 (1942); John Aldrich, *Why Parties?* 18 (1995).

[6] There are, for example, no provisions for a public referendum on the United States Constitution.

[7] *Ibid.*, n. 5.

weakens the collective responsibility of political parties."[8] The cases decided by this court "vigorously affirm the *special place* the First Amendment reserves for, and the *special protection* it accords, the *process* by which a political party 'select[s] a standard bearer who best represents the party's ideologies and preferences.'"[9] (emphasis added).

The First and Fourteenth Amendments guarantee free exercise of political association rights

"The ability of the members of the [named political] Party to select their own candidate . . . unquestionably implicates an associational freedom."[10] Alexis de Tocqueville wrote the right of association for political purposes is inextricably joined to the right to liberty:

> "The most natural privilege of man, next to that of acting for himself, is that of combining his exertions with those of his fellow creatures, and of acting in common with them. The right of association therefore appears to me almost as inalienable in its nature as the right of personal liberty. No legislator can attack it without impairing the foundations of society."[11]

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[8] Persily and Cain, *Symposium: Law and Political Parties: The Legal Status of Political Parties: a Reassessment of Competing Paradigms*, 100 Colum. L. Rev. 775, 787 (2000).

[9] *Jones*, 530 U.S. at 575.

[10] *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 235-236, 107 S.Ct. 544, 93 L.Ed.2d 514 (1986) (Scalia, J., dissenting) (hereinafter *Tashjian*).

[11] 2 A. de Tocqueville, *Democracy in America* 203 (Bradley ed. 1954).

Freedom of association for political purposes is a *fundamental liberty right* protected in the United States' Constitution.

> "It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech. The freedom of association protected by the First and Fourteenth Amendments includes partisan political organizations. The right to associate with the political party of one's choice is an integral part of this basic constitutional freedom."[12]

The purposes of the First Amendment are best served by free exercise of political association rights by both parties and voters.

"[T]here is practically universal agreement that a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs."[13] In *Tashjian* a group of nine political scientists told this court "[t]he fundamental objectives of the freedoms of speech, press, petition, assembly and association were to assist the people in self government and to permit the people to

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[12] *Tashjian, 479 U.S. at* 214 (citations omitted) (internal quotes omitted).

[13] *First Nat. Bank of Boston v. Bellotti*, 435 U.S. 765, 776-777, 98 S.Ct. 1407 (1978) (citation omitted).

thwart the abuse of power by their elected and appointed leaders."[14] Accordingly:

> "The appropriate solution to questions of political party structure depends upon the contextual questions of time, place and political objective. . . . It is fundamental to the First Amendment that there is no fixed immutable truth, no one position that parties may be expected to expound forever. As circumstances change, the parties must be free to explore the political requisites of the period. Hence, any legislation which denies to parties the opportunity to make a political choice which affects the message which it can espouse to the public – its nominations and platforms and all that the parties stand for – impoverishes public discourse."[15]

It is entirely legitimate at one time and place for the electorate to prefer moderate or centrist politics and greater competition between candidates. Candidate nomination systems favoring broad based consensus decision-making and competition, such as blanket and open primary systems, serve First Amendment purposes by allowing the public to coalesce around popular policy positions. It is equally legitimate at another time and place for the electorate to conclude that traditional politics have not worked and that programmatic or ideologically driven candidates are necessary and appropriate. Candidate

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[14] *Brief of Amici Curiae Seeking Affirmance*, James MacGregor Burns, Barbara Burrell, William Crotty, James S. Fay, Roman B. Hedges, John S. Jackson, III, Everett C. Ladd, Kay Lawson, Gerald Pomper, political scientists, p. 7., *Tashjian*, supra (85-766) (hereinafter *Tashjian Amicus*).

[15] *Tashjian Amicus*, at 10-11.

nomination systems that favor clarity of program and ideology, such as closed and semi-closed primary systems, serve First Amendment purposes by giving the public greater control over explicit policy choices and course of government.[16]

Professor McLuhan taught, "The medium is the message."[17] The nature, structure and operation of any primary electoral system informs and often determines the outcome of public discourse. The tension between "change" and "stability" in electoral models is what drives political discourse and is precisely what the First Amendment is designed to protect. "[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment, . . ."[18] Likewise, any statutory scheme that restricts the ability of one political party to formulate and promulgate its message in order to enhance the relative voice of other political parties violates the First Amendment and may violate the equal protection guarantees of the Fourteenth Amendment.[19]

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[16] *Id.*, at 14-24.

[17] M. McLuhan, *Understanding Media: The Extensions of Man* (Cambridge: The MIT Press, 1994).

[18] *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976).

[19] *Bullock v. Carter*, 405 U.S. 134, 141, 92 S.Ct. 849 (1972) ("Although we have emphasized on numerous occasions the breadth of power enjoyed by the States in determining voter qualifications and the manner of elections, this power must be exercised in a manner consistent with the Equal Protection Clause of the Fourteenth Amendment.") (citations omitted)); cf., *Dunn v. Blumstein*, 405 U.S. 330, 336, 92 S.Ct. 995 (1972) (right to vote is "a fundamental political right" under equal protection analysis).

> "Our form of government is built on the premise that every citizen shall have the right to engage in political expression and association. This right was enshrined in the First Amendment of the Bill of Rights. Exercise of these basic freedoms in America has traditionally been through the media of political associations. Any interference with the freedom of a party is simultaneously an interference with the freedom of its adherents."[20]

A primary system wherein political parties can chart their own course between and within the alternatives of "change" and "stability" will self-modulate in response to voter preferences as expressed at the polls.[21] On the other hand, a state imposed system that limits either the "change" or the "stability" model or prefers one model to the other not only burdens the right of political parties to develop and promulgate their temporal messages; it also deprives the public of the flexibility necessary to fully exercise its own First Amendment right to choose consensus or ideological candidates as political conditions change.

Essential to a meaningful electoral contest is the ability to self-define the nature of the party and its message. "The nature of the nominating procedure determines the nature of the party; he who can make the nomination is owner of the party."[22] "A political party is not a public utility simply providing a power grid for candidates' messages. Parties shape the message, and for a state to

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[20] *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957).

[21] *Brief of Amicus Curiae Northern California Committee for Party Renewal*, at 14, *Jones*, supra (99-401).

[22] E.E. Schattschneider, *Party Government* 64 (1942).

control any party's central function of nominating is for the state to control the message."[23]

If the parties are deprived of their ability to define themselves and their goals through the nomination of candidates the public is presented with a false choice. Political discourse is thus impoverished, leading ultimately to a government that does not reflect the wishes of either the electorate or the political parties.

The First Amendment guarantees "broad" rights to political parties to adopt their own nominating rules.

Any authority states may have to regulate the "time, place and manner" of elections,[24] does not allow them to interfere with the nominating processes of political parties. This court has "continually stressed that when States regulate parties' internal processes they must act within limits imposed by the Constitution."[25] This court has also "said that 'implicit in the right to engage in activities protected by the First Amendment' is 'a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends'"[26]

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[23] *Brief of Amicus Curiae Northern California Committee for Party Renewal*, at 8, *Jones*.

[24] *Const. Art.* I, § 4.

[25] *Jones*, 120 S.Ct. at 2407 (citing *Eu v. San Francisco Democratic Comm.*, 489 U.S. 214 (1989) (hereinafter *Eu*), and *Democratic Party Of U.S. v. Wisconsin ex rel. La Follette*, 450 U.S. 107 (1981) (hereinafter *La Follette*) (footnote omitted).

[26] *McConnell v. Federal Election Comm'n*, 540 U.S. 93, 256, 124 S.Ct. 619 (2003) (citing to *Roberts v. United States Jaycees*, 468 U.S. 609, 622, 104 S.Ct. 3244, 82 L.Ed.2d 462 (1984)) (hereinafter *Roberts*).

The First Amendment right of association "necessarily presupposes the freedom to identify the people who constitute the association, . . ."[27] "Since control over participation in a primary can profoundly influence the content of the compromise emerging from the primary election, a political party's ability to define its boundaries cannot be separated from the party's ability to determine its political ideology."[28]

> "In no area is the political association's right to exclude more important than in the process of selecting its nominee. That process often determines the party's positions on the most significant public policy issues of the day, and even when those positions are predetermined it is the nominee who becomes the party's ambassador to the general electorate in winning it over to the party's views."[29]

Taken together *Tashjian* and *Jones* confirm there was no constitutional distinction between the associational right of a political party to include participants and the associational right of a political party to exclude participants. "The Party's attempt to broaden the base of public participation in and support for its activities is conduct undeniably central to the exercise of the right of association."[30] "Freedom of association would prove an empty

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[27] *La Follette*, 450 U.S. at 122.

[28] Berdon, J. *The Constitutional Right of the Political Party to Chart its Own Course: Defining Its Membership Without State Interference*, 22 Suffolk U.L.R. 933, 965 (1986) (quoting Note, *Primary Elections and the Collective Right of Freedom of Association*, 94 Yale L.J. 117, 126 (1984)) (hereinafter *Berdon*).

[29] *Jones*, 120 S.Ct. at 2408.

[30] *Tashjian*, 479 U.S. at 214.

guarantee if associations could not limit control over their decisions to those who share the interests and persuasions that underlie the association's being."[31]

Because the moment of choosing the party's nominee is "the crucial juncture at which the appeal to common principles may be translated into concerted action, and hence to political power in the community,"[32] freedom of association must mean a political party has a right to "select a standard bearer who best represents the party's ideologies and preferences."[33] Consistent with these principles this court has held that political parties have "broad" rights: to invite non-members to participate in their nomination process,[34] and the right to exclude non-members from participating,[35] the right to insist on loyalty to party principles[36] and the right to require a loyalty pledge from candidates.[37]

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[31] *Jones*, 530 U.S. at 574-575 (citing to *La Follette*, at 122, n. 22, 101 S.Ct. 1010 (quoting L. Tribe, *American Constitutional Law* 791 (1978)) and to *Roberts*, 468 U.S. at 623.

[32] *Tashjian*, 479 U.S., at 216.

[33] *Eu* 489 U.S. at 224; cf. *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 359 (1997) (hearinafter *Timmons*) ("[T]he New Party, and not someone else, has the right to select the New Party's standard bearer.").

[34] *Tashjian*, supra.

[35] *Jones*, supra; *La Follette*, 450 U.S. at 122.

[36] *Nader v. Schafer*, 417 F.Supp. 837, 847 (D.Conn. 1976), summarily aff'd, 429 U.S. 989 (1976).

[37] *Ray v. Blair*, 343 U.S. 214, 231 (1952).

The burdens imposed by Oklahoma on the respondent political party members are severe, warranting strict scrutiny.

Political parties and their right of association for the purpose of nominating candidates are entitled to "special protection." As clearly demonstrated above, any interference with party determinations regarding who may cast a vote in that process interferes with the party message and is therefore severe. Petitioners ask this court to substitute its judgment as to the severity of this burden. "But it is not for the courts to mediate the merits of this dispute. For even if the State were correct, a State, or a court, may not constitutionally substitute its own judgment for that of the Party. A political party's choice [concerning who may participate in its elections] is protected by the Constitution."[38]

The Tenth Circuit Court of Appeals correctly applied strict scrutiny to this case. Relying on *Anderson v. Celebrezze*,[39] it observed that a court

> "must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It then must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed

[38] *La Follette*, 450 U.S. at 123-124 (footnote following); cf., *Ripon Society, Inc. v. National Republican Party*, 173 U.S.App.D.C. 350, 368, 525 F.2d 567, 585 (1975) (en banc) ("[A] party's choice, as among various ways of governing itself, of the one which seems best calculated to strengthen the party and advance its interests, deserves the *protection* of the Constitution . . . ") (emphasis of the court), cert. denied, 424 U.S. 933, 96 S.Ct. 1147, 47 L.Ed.2d 341.

[39] 460 U.S. 780, 103 S.Ct. 1564 (1983).

> by its rule. In passing judgment, the Court must not only determine the legitimacy and strength of each of those interests; it also *must consider the extent to which those interests make it necessary to burden the plaintiff's rights.*"[40] (emphasis added)

Then the Court of Appeals, relying on *Timmons*, noted the nature of the burden determined the level of scrutiny. The Court of Appeals observed that, with one easily distinguished exception, this court has employed strict scrutiny in cases where states had restricted parties from defining the boundaries of their own association.[41] Noting that this case falls squarely between *Tashjian* and *Jones* the Court of Appeals correctly applied strict scrutiny.[42]

The petitioners have not shown or articulated any interests that overbalance infringement of the respondents' rights.

Any interest that petitioners advance to justify a regulation must be germane to the subject matter it is attempting to regulate. "When it is shown that state action threatens significantly to impinge upon constitutionally protected freedom it becomes the duty of . . . [the] court to determine whether the action bears a reasonable relationship to the achievement of the governmental purpose

[40] *Clingman*, 363 F.3d at 1055; (quoting *Celebrezze*, 460 U.S. at 789). The significance of the highlighted portion will be discussed below.

[41] See, e.g., *Jones*, 530 U.S. at 582; *Eu*, 489 U.S. at 225; *Tashjian*, 479 U.S. at 225; *La Follette*, 450 U.S. at 124; *Cousins v. Wigoda*, 419 U.S. 477, 489 (1975).

[42] 363 F.3d at 1057.

asserted as its justification."[43] Having identified germane interests, if any, the state has the burden of proving that the interest is compelling.[44] The *Celebrezze* analysis, which this court has consistently followed for decades in election cases, states the court "must consider the extent to which those interests make it necessary to burden the plaintiff's rights."[45] This element of the *Celebrezze* test unavoidably requires a factual showing of necessity by the state.

> "Not to require the state to empirically demonstrate that there is a basis for the interest it claims to justify the regulations, or at least require specific legislative finding to support the claim, seriously devalues the party's associational rights. It seems incredible that an interest can be compelling without some factual basis to support it."[46]

In *Eu*, this court required the state to produce evidence that the regulation was necessary.[47] *Jones* analyzed California's asserted interests "*in the circumstances of this case*."[48] Recently this court reaffirmed that a state must show "more than assertion and conjecture" to support a compelling state interest.[49] Regardless what level of

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[43] *Bates v. City of Little Rock*, 361 U.S. 516, 525 (1960) (cited by *La Follette*, 450 U.S. at 128).

[44] *Oregon v. Mitchell*, 400 U.S. 112, 238 (1970).

[45] See, n. 38, supra, and related text.

[46] *Berdon*, at 959.

[47] *Eu*, at 233 ("In sum, a State cannot justify regulating a party's internal affairs without showing that such regulation is necessary to ensure an election that is orderly and fair.").

[48] *Jones*, 120 S.Ct. at 2413 (emphasis of the court).

[49] *Republican Party of Minnesota v. White*, 536 U.S. 765, 781, 122 S.Ct. 2528 (2002) (citing *Landmark Communications, Inc. v. Virginia*,

(Continued on following page)

scrutiny is applied, petitioners here are required but have failed to *demonstrate* why it is necessary to burden the respondent's rights.

In *Tashjian* the nine *amici* political scientists emphasized the conflict of interest legislatures have in making determinations about who may vote in a particular party primary.

> "To give the party in power control over the structure of its opponents undermines the ability of the latter to make its best contribution to our political process. That conflict of interest is certainly inherent in the decision about who can vote in the opposing party primary. Thus making that decision by legislation rather than by party rule, affords immense opportunities to thwart the attempt of the party out of power to set its own agenda and make its most useful contribution to political discussion."[50]

Professor Berdon echoed this sentiment in a law review article published contemporarily to *Tashjian*.

> Strict scrutiny for all infringements other than those that are insubstantial is absolutely essential because of the nature and importance of the right. To allow the majority party to impose regulations on the internal affairs of the minority party, and in particular, regulate who it can invite into the ranks of its association – either through formal membership, voting in primaries

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435 U.S. 829, 841 (1978), and *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 816 (2000).

[50] *Tashjian Amicus*, at 8-9 (citations omitted).

or other forms of membership – could be disastrous.[51]

The petitioners and *Amici* States[52] vigorously attempt to portray this case as a voters' rights case.[53] Their reliance on *Rosario v. Rockefeller*[54] and *Burdick v. Takushi*[55] is misplaced because this is first and foremost a party rights case. Voters' rights, while implicated, are not material until *after* a political party exercises its "freedom to identify the people who constitute the association,"[56] which freedom the petitioners clearly deprive of the respondents.

To the extent petitioners attempt to assert the rights of other political parties in Oklahoma against so-called voter "poaching"[57] they do not represent or claim to represent these other parties and have thus failed to show they

[51] Berdon, 22 Suffolk U.L.R. at 952-953 (citing to BeVier, 73 Calif. L. Rev. 1045 (1985); *Money and Politics: A Perspective on the First Amendment and Campaign Finance Reform*).

[52] See, Brief of the States of South Dakota, Maryland, Massachusetts, New Hampshire, New Mexico, North Carolina, West Virginia and Utah as *Amici Curiae* in Support of Petitioner filed herein (hereinafter *Amici States*).

[53] See, e.g., Brief of Petitioners on the Merits, at 8, 12, 15, 16, 18, 20, 21, 27-29.

[54] 410 U.S. 752, 93 S.Ct. 1245 (1973) (hereinafter *Rosario*).

[55] 504 U.S. 428, 112 S.Ct. 2059 (1992).

[56] *La Follette*, 450 U.S. at 122; and especially compare *Nader v. Schaffer*, supra, with *Tashjian*, supra (*Tashjian* held party entitled to *same associational rights* denied to voters by *Nader*); and see, generally, *Jones*, 530 U.S. at 575-576.

[57] Petitioners describe "poaching" as the act of "draining voters" from other political parties. Brief of Petitioners, at 21.

have standing to raise the matter.[58] Neither could they show any public interest in protecting the rights of other political parties without running afoul of the equal protection clause of the Fourteenth Amendment.[59] Finally, since "acts of public affiliation may subject the members of political organizations to public hostility or discrimination,"[60] some voters may publicly affiliate with one party to avoid hostility yet secretly support another, and thus it is conceivable that the respondents here, representatives of a *minor* political party, could also be *victims* of poaching.

The issue in this case is which voters a political party may invite to participate in nomination of its candidates, not when, or even if, a voter must register with the state by party. "Considered from the standpoint of the Party itself, the act of formal enrollment or public affiliation with the Party is merely one element in the continuum of participation in Party affairs, and need not be in any sense the most important."[61] Considered from the standpoint of government, twenty-two states have no voter registration by party.[62] Thus, party registration cannot be deemed "necessary" or "important" to the "integrity of the political process."

[58] *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561, 112 S.Ct. 2130 (1992).

[59] E.g., *Bullock v. Carter*, supra; *Dunn v. Blumstein*, supra.

[60] *Tashjian*, 479 U.S. at 215, n. 5.

[61] *Tashjian*, 479 U.S. at 215.

[62] The following states do not register voters by party affiliation: Alabama, Arkansas, Georgia, Hawaii, Idaho, Illinois, Indiana, Michigan, Minnesota, Mississippi, Missouri, Montana, North Dakota, Ohio, South Carolina, Tennessee, Texas, Vermont, Virginia, Washington and Wisconsin.

To the extent *Rosario* deemed party registration a compelling interest, it was concerned solely with "party raiding," which this court has defined as a process "whereby voters in sympathy with one party designate themselves as voters of another party so as to influence or determine the results of the other party's primary."[63] Setting aside the question whether petitioners have adequately shown "party raiding" is indeed a palpable problem in Oklahoma,[64] the Supreme Court drew an important distinction in *Tashjian* and again in *Eu*, both decided more than a decade after *Rosario*. "[A] State may enact laws to 'prevent the disruption of the political parties from without' but not, as in this case, laws 'to prevent the parties from taking internal steps affecting their own process for the selection of candidates.'"[65]

Here the respondents have taken "internal steps affecting their own process for the selection of candidates," which the cited cases clearly entitle them to do. The advisability of those steps taken by the respondents is of no concern to the states or this Court. "And as is true of all expressions of First Amendment freedoms, the courts may not interfere on the ground that they view a particular expression as unwise or irrational."[66] In fact, "even if a [specific state action] saves a political party from pursuing self-destructive acts, that would not justify a State substituting its judgment for that of the party."[67] Thus, if a

[63] *Rosario*, 410 U.S. at 760.

[64] The "extent to which [Oklahoma] interests make it necessary to burden the plaintiff's rights" *Celebrezze*, supra, is discussed below.

[65] *Eu*, 489 U.S. at 227; quoting *Tashjian*, 479 U.S., at 224.

[66] *La Follette*, 450 U.S. at 123-124.

[67] *Eu*, 489 U.S. at 228.

political party desires to invite members of another party into its nominating process the purported state interest in protecting against "party raiding" disappears.

Similarly, *Amici* States argue on behalf of "party loyalty," "volunteer recruiting and voter turnout efforts"[68] without demonstrating how any of these are state, as opposed to political party, interests. Reduced to their essence, these arguments merely preserve the preeminence of the established political parties and invite this court to ratify likely violations of the equal protection guarantees of the Fourteenth Amendment.

Despite suggestions from various quarters to the effect that the "two-party system" has resulted in "sound" government, there is scant empirical proof for the proposition in this case or elsewhere. There have been, and not merely coincidentally, no truly vibrant third parties in America since the introduction of the direct primary more than a century ago.[69] Thus the relative efficacy of the "two-party system" is near impossible to test. To the extent the "two-party system" assumes a state imprimatur the equal protection guarantees of the Fourteenth Amendment are clearly implicated.[70] "It demeans the strength of the two-party system to assume that the major parties need to rely on laws that discriminate against independent voters and minor parties in order to preserve their positions of

[68] *Amici* States, at 2-3.

[69] M. L. Kornbluh, *Why America Stopped Voting: The Decline of Participatory Democracy and the Emergency of Modern American Politics*, 34 (NYU Press 1999); and *see* n. 50, supra and accompanying text.

[70] *Williams v. Rhodes*, 393 U.S. 23, 89 S.Ct. 5, 21 L.Ed.2d 24 (1968).

power."[71] Meanwhile, the two party system has inadequacies that a multiparty system would resolve.[72]

Moreover, neither petitioners nor *Amici* States have shown how these interests make any restrictions on respondent's associational rights necessary. As the Court of Appeals observed, "What is less clear, and what Oklahoma fails to demonstrate, is why a few changed outcomes in tightly contested primaries would undermine the integrity of the political process, or how somewhat altered election results would diminish Oklahoma's political stability."[73]

Finally, *Amici* States resort to the so-called "party splintering and unrestrained factionalism" argument that apparently formed a basis for the results in *Storer v. Brown* and *Timmons*.[74] Setting aside the rejoinder that this is just another major party protection argument masquerading as a state interest, there has been no evidentiary showing this is a problem. Moreover, both cases are easily distinguishable. Both related to the identification of *candidates*, not to identification of the *membership* that makes up the association. They are therefore inapposite to the issues of this case.

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[71] *Timmons*, 520 U.S. at 381-382 (Stevens, J. dissenting).

[72] "Nothing is more plain to the student of history than the tendency of one party [in a two party system] to assimilate the principles and the policies of its opponent." Andrew C. McLaughlin, *Political Parties and Popular Government*, in *The Courts, the Constitution and Parties*, 151 (1912). "We choose between Tweedledum and Tweedledee." Helen Keller, *Letter to Mrs. Grindon*, Jan. 12, 1911, Published in the *Manchester Advertiser*, Mar. 3, 1911.

[73] *Clingman*, 363, F.3d at 1060.

[74] See, *Timmons*, 520 U.S. at 368 (quoting *Storer v. Brown*, 415 U.S. 724, 728 (1986)).

Rather, the principles underlying *Roberts v. U.S. Jaycees* are fundamental to analysis of the case. "Protection of the association's right to define its membership derives from the recognition that the formation of an expressive association is the creation of a voice, and the selection of members is the definition of that voice."[75] Neither *Storer* nor *Timmons* were concerned with the definition of the general membership of the association or the definition of the "voice" of the membership; rather, they were concerned with the identity of the association's "standard bearer."

Moreover, the "anti-faction" reasoning raised by the *Amici* States stems in part from a misreading of Madison's Federalist No. 10. In fact, writing in Federalist No. 10 about a remedy to the problem of factions, Madison said:

> "Does it consist in the greater security afforded by a *greater variety of parties*, against the event of any one party being able to outnumber and oppress the rest? In an equal degree does the *increased variety of parties* comprised within the Union, increase this security."[76] (emphasis added)

Thus, a correct reading of Madison logically leads, as does common sense, to the conclusion that party-splintering and factionalism is less likely to occur in a multi-party system than in a two-party system. Finally, to the extent that "integrity of the political process" or preventing "factionalism" is a state interest, there is

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[75] *Roberts*, 468 U.S. at 633 (O'Connor, J., concurring in part and concurring in the judgment).

[76] The Federalist, No. 10 (Madison).

reason to suspect the motivations of those elected representatives who seek to place limits on political parties that are without elected representatives.

> "The political 'expertise' of legislators, however, may not be a completely reliable guarantee of their disinterestedness in reforming the political process. Indeed, there are reasons to believe that legislators, given free rein to inhibit political activity, might attempt to restructure the political balance of power so as principally to benefit themselves and their political allies. In fact, many political process 'reforms' seem to promise tempting short-run political advantages to incumbents and their allies."[77]

The argument against "factionalism" is an argument for preservation of the established political regime. As such it is contrary to the fundamental purpose of the First Amendment as articulated by this Court. More important, it introduces the risk of discrimination of an invidious nature against those political associations whose interests are, by definition, not represented in and without the protections of the legislative process.

CONCLUSION

> "If our system of government is to remain responsive to the will of the people – as it must – the untrammeled freedom to join together in pursuit of political goals must be secured against state intrusion, and our political organizations

[77] BeVier, 73 Calif. L. Rev. at 1076; cf. *Tashjian Amicus*, supra, at n. 50.

> must retain the freedom to invite into their ranks those citizens with whom they wish to associate."[78]

In *Tashjian*, the nine political scientists who filed an *amicus* brief with the Supreme Court noted that they held "different perspectives on the best form of primary election," but concluded nonetheless "political parties can best contribute to American politics if permitted to steer their own courses."[79]

The petitioners and *Amici* States invite this court to discriminate against a minor political party on the basis of state interests the petitioners have alleged but have not shown are "necessary to burden the plaintiff's rights." This court should decline the invitation and affirm the Court of Appeals.

Respectfully submitted,

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[78] *Republican Party of Connecticut v. Tashjian*, 770 F.2d 265, 267 (2nd Cir. 1985).

[79] *Tashjian Amicus*, at 3-4.